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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1760

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME,

Petitioners,

-v.-

NATIONAL SEA CLAMMERS ASSOCIATION and GOSTA LOVGREN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
Attorney for Petitioners
100 Church Street
New York, N.Y. 10007
(212) 566-2091

L. KEVIN SHERIDAN,
STEPHEN P. KRAMER,
of Counsel.

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OPINIONS BELOW

The opinion of the Court of Appeals dated February 4, 1980 is not reported, and is reproduced at page 1a of the Appendix to the petition filed in Middlesex County Sewerage Authority, et al., v. National Sea Clammers Ass'n, Case No. 79-1711, filed in this Court on April 29, 1980 (hereafter

the "Middlesex Appendix").* The opinion of the Court of Appeals was accompanied by an unpublished Judgment dated February 5, 1979, which is reproduced in the Middlesex Appendix at 37a. The opinion of the District Court dated August 14, 1978, is not officially reported and is reproduced in the Middlesex Appendix at 40a. A copy of the District Court order which accompanied the opinion is reproduced in the Middlesex Appendix at 68a. The relevant provisions of the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq. and the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1401 et seq. are reproduced in the Middlesex Appendix at 73a.

*Petitioners herein will rely on the Middlesex Appendix and will not file a separate appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1980. This petition for certiorari has been filed within 90 days of that judgment. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1254(1) and Rule 22(3) of the Supreme Court Rules.

OTHER PARTIES

The other parties named as appellees in the court below were the United States Environmental Protection Agency; Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency; United States Army Corps of Engineers; Martin R. Hoffman, individually and as Secretary of the United States Department of the Army; Bergen County Sewer Authority; The Joint Meeting of Essex and

Union Counties; Passaic Valley Sewerage Commissioners; Middlesex County Sewerage Authority; The Linden Roselle Sewerage Authority; Middletown Sewerage Authority; the City of Glen Cove; and the City of Long Beach. Others named as parties in the District Court were the New York Department of Environmental Conservation; Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation; New Jersey Department of Environmental Protection; David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection; County of Westchester Department of Environmental Facilities; and the West Long Beach Sewer District.

QUESTIONS PRESENTED

1. Under the federal common law of nuisance or maritime tort law, may fisher-

men maintain an action for damages or equitable relief?

2. Does either the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., or the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1401 et seq., authorize an implied right of action other than that expressly provided for in each act?

STATEMENT OF THE CASE

Respondent National Sea Clammers Association is an association whose members make their living harvesting fish and shellfish from the water and ocean beds of the Atlantic Ocean near New York and New Jersey. Respondent Lovgren is an individual similarly employed. Petitioners City of New York and Beame,* and the other parties in the District

*Edward I. Koch replaced Abraham Beame as Mayor of the City of New York on January 1, 1978.

Court, are various federal, state and local officials and governmental departments that are charged with environmental protection or that are responsible for sewage treatment and disposal.

Plaintiffs allege that defendants discharged or permitted the discharge of certain nutrient-rich sewage and toxic wastes into the Atlantic Ocean or its tributaries. They further allege that in 1976 these discharges caused death and other adverse effects on marine life, and, as a result, they had business losses.

The complaint was dismissed by the District Court, with prejudice, on all claims except for two said to arise under state law which were dismissed without prejudice. The Court of Appeals reversed dismissal of those claims based upon the Federal Water Pollution Control Act, 33

U.S.C. §§1251-1376 (hereafter the "FWPCA") the Marine Protection, Research and Sanctuaries Act 33 U.S.C. §§1401-1444 (hereafter the "MPRSA"), the federal common law of nuisance, and the maritime tort law.

The Court of Appeals held that although these plaintiffs could not avail themselves of the express remedies provided for in the statutes, as they had not complied with the statutory preconditions for institution of a lawsuit, the complaint offered numerous avenues for relief. The Court of Appeals held that plaintiffs alleging "special damages" to their means of livelihood could seek enforcement of the water pollution control statutes, and damages, under an "implied" cause of action theory. The Court found private rights to be implied in the statute and that these implied rights had been saved under 33 U.S.C. §1365(e) of the

FWPCA and 33 U.S.C. §1415(g)(5) of the MPRSA. These two sections provide that the express statutory remedies shall not restrict the availability of other statutory or common law rights and remedies a person may have. The Court of Appeals also found remedies for these plaintiffs in the federal common law of nuisance, and the maritime tort law.

None of the remedies authorized has precedent in decisions of this Court; indeed they contradict what had been unquestioned law for almost a century. In Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), this Court held that private parties had no cause of action under federal common or maritime law for property damage arising out of nuisances in navigable waters. Illinois v. City of Milwaukee, 406 U.S. 91 (1972), upon which the Court of Appeals relied, did not

overrule Willamette - indeed Willamette has been extensively discussed by this Court subsequent to the decision in Illinois v. Milwaukee with no indication that it has lost its validity. See United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 663 (1973). Illinois v. Milwaukee stands only for the proposition that states, alleging infringement of their sovereign interests by interstate polluters, may invoke the power of the federal district courts to seek relief. But there is no precedent in this Court to support a private party's claim for lost profits on the ground that federally regulated pollution violates federally protected property interests.

Moreover, the status of the type of common law cause of action authorized in Illinois v. Milwaukee is in considerable doubt. This Court has recently granted

certiorari to determine whether the FWPCA -- which differs markedly from the predecessor statute construed in Illinois v. Milwaukee -- preempts the federal common law enunciated in that case. See Illinois v. City of Milwaukee, 599 F. 2d 151, cert. granted ____ US. ___, 48 U.S.L.W. 3902 (March 18, 1980). There is an inherent tension between judicially created standards of conduct and a detailed regulatory program in which Congress has authorized the discharge of pollutants under specific conditions.

The FWPCA and the MPRSA set forth a comprehensive scheme for regulating water pollution. All discharges of pollution are forbidden except those which are explicitly authorized. 33 U.S.C. §§1311, 1411 (a). Every single pipe ("outfall") which can discharge pollutants into a navigable body of water must be approved by and receive a per-

mit from the United States Environmental Protection Agency ("EPA") or a duly designated state agency (§§1311-1316; 1342). EPA also has the power to impose stringent limitations on what is contained in those discharges and how those discharges shall be treated.

The FWPCA mandates national standards for all direct and indirect discharges and makes violation of these standards actionable. (Under prior law, it was necessary to prove individual responsibility for violations of water quality standards before a statutory remedy could be invoked.) The statute establishes a timetable for elimination of water pollution (§1311). Municipal sewage systems (publicly owned treatment works) must achieve secondary treatment by July 1, 1977, and, subject to certain limited exceptions, must employ the best

practicable water treatment technology by July 1, 1983.

The Administrator may sue directly for the violations of any permit (§1319). He no longer is limited to requesting the commencement of an abatement action - something he was able to do only after what was characterized by the Supreme Court as a "long-drawn-out procedure." Illinois v. Milwaukee, supra, 406 U.S. at 103. The statute provides for citizen suits to enforce the requirements of the FWPCA (§1365) if the citizen notifies the EPA Administrator and the polluter of a violation and the Administrator fails to seek abatement within 60 days.

The MPRSA sets up a parallel scheme regulating ocean pollution. The MPRSA prohibits the dumping of any material into ocean waters except as authorized by permit

(§1411). Section 1412 (a) authorizes the EPA Administrator to issue a permit for the dumping of any material other than dredged material where he "determines that such dumping will not unreasonably degrade or endanger human health, welfare or amenities, or the marine environment, ecological systems, or economic potentialities", and specifically requires inquiry into the impact of ocean dumping on fishing and shellfishing resources. Ocean dumping permits include conditions which regulate the type and amount of material which can be dumped, locations of dumping, provisions for monitoring and surveillance, as well as any other conditions and provisions which the Administrator deems appropriate (§1414). Permit conditions may be enforced by assessment of civil and criminal penalties, or by citizen suits (§§1415 and 1417) upon compli-

ance with the statutory notice requirements.

REASONS FOR GRANTING THE WRIT

1. NEITHER THE FEDERAL COMMON LAW NOR THE MARITIME LAW ENCOMPASSES CLAIMS BY FISHERMEN THAT REGULATED POLLUTION OF INTERSTATE OR NAVIGABLE WATERWAYS CONSTITUTES A NUISANCE OR IS DIMINISHING THE PROFITS OF THEIR FISHING BUSINESS.

In Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), the Court held that a private citizen could not challenge a nuisance or obstruction in a navigable waterway under the "federal common law." There the owner of a wharf sued to prevent the construction of a bridge which would have impeded boat access to his waterfront property. The Court dismissed the suit, stating:

> The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no com-

> mon law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law.... (125 U.S. at 8.)

While Willamette concerned an interstate bridge crossing a navigable waterway, the Court made it clear that it was the private chracter of the parties and the non-sovereign interests they represented which precluded relief under federal common law or maritime law. The court noted (at 125 U.S. 13-14) that if this nuisance interfered with the operations of the federal government, it would indeed be actionable.

Congress's response to the Court's decision in Willamette Iron Bridge was a series of laws that were later re-enacted as the Rivers and Harbors Act of 1899, 33

U.S.C. §407 (1976). See generally, United States v. Pennsylvania Industrial Chemical Corp., supra, 411 U.S. at 663; United States v. Republic Steel Corp., 362 U.S. 482, 488 (1960). No private rights were, however, created. Enforcement is limited by its terms to enforcement by the United States Attorneys. 33 U.S.C. §413 (1976). See Red Star Towing & Transportation Co. v. Dept. of Transportation, 423 F. 2d 104, 105 (3rd Cir. 1970); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F. 2d 81, 90 n. 16 (2nd Cir. 1972); Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140, 1147 (N.D. Ala. 1971).

Congress's refusal to create private rights when it responded to Willamette Iron Bridge should not be judicially overruled by creation of the very common law right rejected in Willamette. Certainly such pri-

vate federal rights cannot be based upon the decision in Illinois v. Milwaukee, 406 U.S. 91 (1972), upon which the Court below relied. Illinois v. Milwaukee held that "federal common law" authorized a claim by a state that pollution of navigable waters was creating a public nuisance. Virtually all of the pollution cases relied upon in Illinois v. Milwaukee involved claims by a sovereign that its sovereign interests were being infringed upon by activities of persons in another state. The Court quoted extensively from Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), where the philosophy behind development of a federal common law of nuisance was enunciated -- that a forum to peacefully adjudicate disputes between formerly sovereign states was a necessary corollary to the federal system:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. Missouri v. Illinois, 180 U.S. 208, 241.

These considerations do not support creation of federal common law rights in private parties. Respondents here pursue no sovereign interests -- they claim only lost profits from fishing in the territorial waters of the United States. And the paramount sovereign interest in these waters has been expressed in the water pollution control statutes themselves. See infra, pp. 20-21.

Other federal courts have for the most part rejected the notion that private parties raising no sovereign interests can sue

under the federal common law for relief from water pollution in navigable waterways. See Parsell v. Shell Oil Co., 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co., 573 F. 2d 1289 (2d Cir. 1977); Committee for Consideration of Jones Falls Sewage System v. Train, 375 F. Supp. 1148, 1153-1154, (D. Md. 1974), aff'd on different but not inconsistent grounds, 539 F. 2d 1006 (4th Cir. 1976); cf. City of Evansville, Indiana v. Kentucky Liquid Recycling Corp., 604 F. 2d 1008 (7th Cir. 1979); Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978); contra, Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975). Hence, the third circuit stands alone with one district court in allowing a private party to invoke federal common law.

Moreover, in the present statutory framework where Congress has prohibited the discharge of all pollutants except in compliance with detailed regulations, it is anomalous to conclude that the federal common law or maritime law sets standards of conduct different from those set forth in the statutes. See Illinois v. Milwaukee, supra, 406 U.S. at 107. See also Committee for Jones Falls Sewage System v. Train, supra, 539 F. 2d at 1009; see also Potomac River Ass'n Inc. v. Lundeberg Maryland Steamship School, Inc., 402 F. 2d 344 (D. Md. 1975); Ellison v. Rayonnier, Inc., 156 F. Supp. 214 (D. Wash. 1975). Specific Congressional standards by their own force preempt common law standards. Nor are there statutory "interstices" which need be filled, out of which a common law could be formed. Congress has regulated every

source of water pollution in the nation.

This Court has recognized that federal legislation replaces previously applicable federal common law principles in Arizona v. California, 373 U.S. 546 (1963). Arizona v. California dealt with the allocation of water in the Colorado River between the various states that border on that river. Congress had passed a statute which provided for a method and formula for allocation of those waters. California argued that the apportionment of the water in the Colorado River should be controlled by the common law doctrine of equitable apportionment which the Supreme Court had applied in earlier cases involving disputes between the various states. The Supreme Court rejected California's argument, noted that a federal statute was involved, and said:

> It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress. (373 U.S. at 565)

This important question of federal law impacting upon interstate and navigable waters should be settled. Regulated pollution should be immune from challenges under the maritime or common law, particularly in cases brought by private parties. Indeed the MPRSA standard for the EPA to apply in considering ocean dumping is precisely the same that a judge would apply in a case

arising under the maritime or common law - dumping is allowed where it will not have an unreasonable impact on water quality standards. 33 U.S.C. §1412(a). Practical and economic reality dictate that dischargers required to expend huge sums of public funds know that the applicable standards are fixed, final, and immune from collateral attack.

While it is true that both the FWPCA and the MPRSA contain a savings clause which preserves common law rights and remedies, these clauses do not themselves authorize creation of new federal standards of conduct and private rights did not previously exist. See City of Evansville, Ind. v. Kentucky Liquid Recycling Corp., supra, 604 F. 2d 1008, 1014 (7th Cir., 1979). The fourth circuit has held that this clause was meant only to preserve rights under state law.

Committee for Jones Falls Sewage System v. Train, supra, 539 F. 2d at 1009, n. 9. The extent of the common law in this thoroughly regulated field should be delineated.

2. NEITHER THE FEDERAL WATER POLLUTION CONTROL ACT, NOR THE MARINE PROTECTION, RESEARCH AND SANCTUARIES ACT, AUTHORIZES RIGHTS OR REMEDIES OTHER THAN THOSE EXPRESSLY PROVIDED FOR IN EACH ACT.

The FWPCA contains a provision granting any private citizen the right to sue to enforce compliance with effluent standards or limitations, or to compel the Environmental Protection Agency to perform non-discretionary duties, upon compliance with a requirement that 60 days' notice be given to specified parties to the lawsuit. 33 U.S.C. §1365(a)(1) and §1365(b). The MPRSA contains virtually identical provisions. 33 U.S.C. §1415(g). Plaintiffs herein did not comply with these notice requirements. The Court of

Appeals found, however, that this failure did not bar plaintiffs from asserting a claim under the Acts, holding that plaintiffs who claim special injury from violations of the Acts have an "implied cause of action" to enforce the terms of the Acts which is not conditioned upon reliance with the notice requirements.

The Court of Appeals' analysis of whether these statutes contain an implied cause of action does not comport with the analysis required by the numerous Supreme Court cases which have recently addressed that issue. Moreover, the Court of Appeals' decision virtually reads the notice provisions out of the statutes. Finally, the decision is in direct conflict with the interpretation of the statutes enunciated by the Seventh Circuit Court of Appeals in City of Evansville, Indiana v. Kentucky

Recycling Corp., supra, 604 F. 2d 1008; but see Natural Resources Defense Council v. Callaway, 524 F. 2d 79 (2d Cir. 1975); Natural Resources Defense Council v. Train, 166 U.S. App. D.C. 313, 510 F. 2d 692 (1975). This conflict over the meaning of provisions of major environmental legislation - provisions which are also found virtually verbatim in the Clean Air Act, 42 U.S.C. §1857a et seq. -- should be resolved.

In Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979), this Court held that the central inquiry in determining whether a statute contains an implied cause of action is one of congressional intent. See also, Transamerica Mortgage Advisors v. Lewis, ___ U.S. ___, 100 S. Ct. 242 (1979). In the statutes at bar, Congress clearly intended a private remedy

-- it authorized injunctive relief and civil penalties explicitly in section 1365(a) of the FWPCA and section 1415(g) of the MPRSA upon compliance with specific notice requirements. The question remains whether additional remedies, supplementing the express ones, were intended.

In finding that additional remedies are implied in these statutes, the Court of Appeals ignored the basic tenet of statutory construction: expressio unius est exclusio alterius. As this court admonished in Transamerica, supra, 100 S. Ct. at 245, in a statement dealing with the very issue of supplemental remedies presented here:

> it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it includes

> the negative of any other mode." Botany Mills v. United States, 278 U.S. 282, 209 (1929). See [National Association of Railroad Passengers, 414 U.S. 453, 458]; Securities Protection Investors Corp. v. Barbour, 421 U.S. 419; T.I.M.E., Inc. v. United States, 359 U.S. 464, 471.

The Seventh Circuit rejected an implied right of action under the FWPCA supplementing the expressly authorized remedy. In City of Evansville, Indiana v. Kentucky Liquid Recycling, Inc., supra, 604 F. 2d at 1015, the court held: "Congress, having thus specifically addressed the subject of private remedies, it is reasonable to conclude that it said all it intended on that subject." Cf. CETA Workers Organizing Committee v. Koch, ____ F. 2d ____, Docket No. 79-7649, (2nd Cir. March 5, 1980). The notice provisions may not be read out of the

statute by finding a supplementary "implied" remedy.

The analysis of the court below also does not comport with that enunciated in Cannon v. University of Chicago, 441 U.S. 677 (1979). Cannon explicitly distinguished between a statute, such as the one there in issue, which grants rights to individuals ("no person ... shall, on the basis of sex, be excluded from participation ... in [an] activity receiving federal funding"), and statutes such as the ones at hand which regulate conduct:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting a Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory conduct.

Cannon, supra, 441 U.S. at 690-693. Hence, even though the FWPCA and the MPRSA were intended to benefit users of the waterways, it cannot be fairly said that these statutes confer a set of private rights in a particular class -- rather they regulate conduct and intend to benefit the public at large.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel
Attorney for Petitioners
100 Church Street
(212) 566-2192
New York, N.Y. 10007

By_____
STEPHEN P. KRAMER
Assistant Corporation Counsel

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